Office-Supreme Court, U.S.
FILED
SEP 10 1965
JOHN F. DAVIS, CLERK

[38,115] No. 456

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

IN THE MATTER OF THE APPLICATION

of

VERNON MURPHY,

Petitioner,

against

LEO A. LARKIN, Corporation Counsel of the City of New York, THEODORE H. LANG and GEORGE GREGORY, JR., constituting the Municipal Civil Service Commission of the City of New York, ARTHUR C. FORD, EDWARD C. McGUIRE and HERBERT M. ROSENBERG, constituting the Board of Water Supply of the City of New York, and ABRAHAM D. BEAME, Comptroller of the City of New York,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

LEO A. LARKIN,
Corporation Counsel,
Attorney for Respondents,
Municipal Building,
New York, N. Y. 10007

INDEX

PAGE

Statement 1

Facts 3

Argument:

No substantial federal question is presented by the petition 3

Conclusion 6

CASES CITED

Bressler v. *Board of Higher Education,* 298 N. Y. 112 (1948), 81 N. E. 2d 43 4

Greene v. *McElroy,* 360 U. S. 474 (1959) 5

Koso v. *Greene,* 260 N. Y. 491 (1933), 184 N. E. 65 .. 4

Matter of Byrnes v. *Windels,* 265 N. Y. 403 (1934), 193 N. E. 248 4

Matter of Crehan v. *Thom,* 200 N. Y. S. 2d 972 (Sup. Ct., Suffolk Co., 1960) [not officially reported], affd. 12 AD 2d 502 (2nd Dept., 1960), 209 N. Y. S. 2d 276 4

Matter of Fink v. *Kern,* 176 Misc. 114 (Sup. Ct., N. Y. Co. 1941), 26 N. Y. S. 2d 891, affd. 262 App. Div. 829 (1st Dept., 1941), 29 N. Y. S. 2d 502 4

Peters v. *Hobby,* 349 U. S. 331 (1955) 5

People ex rel. Rosenthal v. *Travis,* 169 App. Div. 203 (1st Dept., 1915), 154 N. Y. Supp. 403 4

Slochower v. *Board of Education,* 350 U. S. 551 (1956) 4

Statute Cited

New York Civil Service Law, § 75 ..... 2, 4, 5

Constitutional Provision

United States Constitution, Fourteenth Amendment 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

IN THE MATTER OF THE APPLICATION

of

VERNON MURPHY,

Petitioner,

against

LEO A. LARKIN, Corporation Counsel of the City of New York, THEODORE H. LANG and GEORGE GREGORY, JR., constituting the Municipal Civil Service Commission of the City of New York, ARTHUR C. FORD, EDWARD C. McGUIRE and HERBERT M. ROSENBERG, constituting the Board of Water Supply of the City of New York, and ABRAHAM D. BEAME, Comptroller of the City of New York,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Statement

The petitioner seeks to have this Court review by writ of certiorari a judgment of the Court of Appeals of the State of New York, entered February 4, 1965 (15 N Y 2d 770, 205 N. E. 2d 533, Pet. Appendix, pp. 15-17), remittitur amended on June 10, 1965, affirming unanimously, two Judges taking no part, an order of the Appellate Division, Third Department (20 A D 2d 595, 245 N. Y. S. 2d 23, Pet. Appendix, pp. 18-19), which affirmed an order of the

Supreme Court, Ulster County, denying the petitioner's application in a proceeding in the nature of mandamus under Article 78 of the Civil Practice Act (now CPLR, Art. 78), wherein he sought reinstatement to the position of Principal Attorney, in the office of the Corporation Counsel of the City of New York at its Division of Water Supply located in Kingston, New York.

The petitioner contends that while he was appointed on July 27, 1955, without examination, to the position of Assistant Counsel (Water Supply), in charge of the Kingston office of the New York City Law Department pursuant to Rule V, Section IX, par. 10, of the then effective Rules of the Municipal Civil Service Commission of the City of New York, the duties of which were to be performed outside of the territorial limits of the City of New York, he was entitled to the same rights of tenure under Civil Service Law § 75 as employees appointed from eligible lists after competitive examinations. The Court of Appeals unanimously affirmed the actions of the lower courts which held that the petitioner was: (1) not entitled to the tenure of a competitive class employee under Civil Service Law § 75 and (2) that while he was a veteran occupying a position in the classified service, he was not entitled to the preferment of charges against him and a hearing thereon pursuant to § 75 because he was a "deputy".

New York Civil Service Law § 75, so far as here relevant, reads as follows:

> "§ 75. *Removal and other disciplinary action*
>
> 1. Removal or disciplinary action. A person described in paragraph (a) or paragraph (b) of this subdivision shall not be removed or otherwise subjected to any disciplinary penalty provided in this section except for incompetency or misconduct shown after a hearing upon stated charges pursuant to this section.
>
> (a) A person holding a position by permanent appointment in the competitive class of the classified civil service, or

(b) a person holding a position by permanent appointment or employment in the classified service of the state or in the several cities, counties, towns, or villages thereof, or in any other political or civil division of the state or of a municipality, or in the public school service, or in any public or special district, or in the service of any authority, commission or board, or in any other branch of public service, who is an honorable discharged member of the armed forces of the United States having served therein as such member in time of war as defined in section eighty-five of this chapter, or who is an exempt volunteer fireman as defined in the general municipal law, except when a person described in this paragraph holds the position of private secretary, cashier or deputy of any official or department."

Facts

As heretofore stated, on July 27, 1955 the petitioner was appointed to the position of Assistant Counsel (Water Supply) in charge of the Kingston office of the Law Department of the City of New York. About three months thereafter, on October 21, 1955, he completed and signed a Position Classification Questionnaire, required to be executed in connection with the reclassification of positions incident to the newly established Career and Salary Plan of the City of New York. Thereafter in July, 1956 the position occupied by the petitioner was reclassified under the Career and Salary Plan to the title of Principal Attorney. Subsequently on April 6, 1961 the petitioner's services were terminated effective April 5, 1961.

ARGUMENT

No substantial federal question is presented by the petition.

(1)

The petitioner has completely failed to demonstrate that any of his federal constitutional rights have been infringed by the judgments of the New York courts.

The New York courts found as a fact that the petitioner was not entitled to tenure and the protection of Civil Service Law § 75, subd. 1(a), because he did not occupy a position in the competitive class as a result of a permanent appointment after passing an examination. The courts also found as a fact that while his position was in the classified service he was not entitled to the protection afforded to veterans under Civil Service Law § 75, subd. 1(b), because he was a "deputy" of the Corporation Counsel who appointed him to his position.

The New York courts have repeatedly held that persons appointed to positions in the public service, without examination, in circumstances similar to those of the petitioner do not obtain tenure under New York law and are, therefore, not entitled to the preferment of charges and a hearing thereon before they may be removed from their positions. *People ex rel. Rosenthal* v. *Travis,* 169 App. Div. 203 (1st Dept., 1915), 154 N. Y. Supp. 403; *Koso* v. *Greene,* 260 N. Y. 491 (1933), 184 N. E. 65; *Matter of Byrnes* v. *Windels,* 265 N. Y. 403 (1934), 193 N. E. 248; *Matter of Fink* v. *Kern,* 176 Misc. 114 (Sup. Ct., N. Y. Co. 1941), 26 N. Y. S. 2d 891, affd. 262 App. Div. 829 (1st Dept., 1941), 29 N. Y. S. 2d 502; *Bressler* v. *Board of Higher Education,* 298 N. Y. 112 (1948), 81 N. E. 2d 43; *Matter of Crehan* v. *Thom,* 200 N. Y. S. 2d 972 (Sup. Ct., Suffolk Co., 1960) [not officially reported], affd. 12 A D 2d 502 (2nd Dept., 1960), 209 N. Y. S. 2d 276.

(2)

The petitioner relies primarily upon the case of *Slochower* v. *Board of Education,* 350 U. S. 551 (1956). The *Slochower* case is clearly distinguishable from the case at bar. That case involved a peremptory removal of Slochower from his position as a teacher, in which he concededly had tenure, because of his exercise of the privilege against self-incrimination under the Fifth Amendment before a Senate Sub-Committee. This Court invalidated the City of New York's attempt to impose the sanction of automatic forfeiture of office pursuant to a section of the New York City Charter for exercising such privilege. This Court held that

the peremptory removal of Slochower without the preferment of charges and a hearing thereon was a denial of due process to Slochower in contravention of the Fourteenth Amendment to the United States Constitution.

However, in the instant case, the petitioner's removal was not occasioned by the exercise of any federal privilege, nor was there any violation of his federal constitutional rights. This case involves solely matters of state law.

The petitioner also cites *Peters* v. *Hobby*, 349 U. S. 331 (1955) and *Greene* v. *McElroy*, 360 U. S. 474 (1959), which were concerned with the validity of procedures against alleged security risks. Obviously, they have no relevancy to the issue in this case.

(3)

The petitioner contends that "The certification of the Federal question by the Court of Appeals establishes that this petitioner was a 'person holding a position by permanent appointment in the competitive class of the classified Civil Service'; otherwise, the petitioner's dismissal created no constitutional issue." (Pet. p. 3, footnote 1, pp. 9-10).

That contention is an obvious *non sequitur*. The Court of Appeals held precisely the opposite, namely, that the petitioner did not hold a position by permanent appointment in the competitive class of the classified civil service and was therefore not entitled to the protection of the provisions of Civil Service Law § 75, subd. 1(a). The certification of a federal question by the Court of Appeals simply means that the petitioner contended before that Court that his federal constitutional rights were infringed by the actions of the lower New York courts and that the Court of Appeals considered such argument and found that it was not valid.

In passing, it should be noted that at page 10 of his petition, the petitioner claims that "226 lawyers employed by the City of New York have been disenfranchised" by

the decision of the Court of Appeals in this case. That statement is completely in error. All employees of the City of New York, whether professional or non-professional, who have been permanently appointed to positions in the competitive class after having successfully passed examinations have tenure and cannot be removed from their positions "except for incompetency or misconduct shown after a hearing upon stated charges" pursuant to Civil Service Law § 75.

CONCLUSION

The petition for certiorari should be denied.

September 9, 1965.

Respectfully submitted,

LEO A. LARKIN,
Corporation Counsel,
Attorney for Respondents.